STATE OF MICHIGAN

COURT OF APPEALS

JAMES H. CHACONAS,

Plaintiff-Appellee,

v

LIMA TOWNSHIP,

Defendant,

and

CHELSEA AREA CONSTRUCTION AGENCY, R. BRUCE CONNELL, and THOMAS MILLER,

Defendants-Appellants.

UNPUBLISHED
August 10, 2006

No. 258979
Washtenaw Circuit Court
LC No. 04-000008-CK

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendants[1] appeal by right the denial of their motion for summary disposition following the trial court's conclusion that Chelsea Area Construction Agency (CACA) is not a governmental agency, thus neither it nor its employees were immune from suit under MCL 691.1401 *et seq*. We reverse and remand.

CACA was established pursuant to the urban cooperation act, MCL 124.501, *et seq*., and is a public body corporate that was created by an interlocal agreement between the Village of Chelsea and the Townships of Sylvan, Lima, Dexter, and Lyndon. See MCL 124.505. CACA's purpose includes "to administer and enforce construction codes and other ordinances adopted by each of the parties; to hire a building official, competent inspectors and other personnel necessary to accomplish the foregoing . . . ." Defendant R. Bruce Connell is the building official of CACA and a CACA building inspector and defendant Thomas Miller is a CACA building inspector.

Plaintiff hired contractor H. Egon Lipps, who is also a backup building inspector for CACA, to complete a major addition and remodeling project on his home. According to

[1] Our use of the term "defendants" refers to the parties appealing the trial court's decision.

plaintiff, the project involved extensive plumbing, electrical, roofing, and insulation work. It also included the addition of a separate apartment unit attached to the home. Plaintiff claims that much of the work did not meet the minimum requirements of the construction code. As a result, plaintiff alleges, he has already spent approximately $50,000 to repair code violations and has been advised that he will need to spend at least another $150,000 in the future. Thus, plaintiff brought this suit against defendants for (1) granting building permits to Lipps, (2) allowing the project to pass inspection, and (3) issuing a final certificate of occupancy despite the numerous and blatant code violations and, thereby, breaching their duties to administer and enforce the applicable construction codes and ordinances. Defendants moved for summary disposition under MCR 2.116(C)(7) arguing that plaintiff's claims were barred by governmental immunity. The trial court denied the motion as discussed above. This appeal followed.

Defendants first argue that they were entitled to summary dismissal because CACA is a governmental agency that was engaged in the governmental function of enforcing the construction code when plaintiff's damages allegedly arose. After de novo review of the trial court's decision on this question of law, considering all documentary evidence in the light most favorable to plaintiff, we agree. See *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999); *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

Generally, a governmental agency that is engaged in the discharge of a governmental function is immune from tort liability. MCL 691.1407(1). A "governmental agency" is defined for purposes of the statute as "the state or a political subdivision." MCL 691.1401(d). A "political subdivision" is:

> [A] municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision. [MCL 691.1401(b).]

A "municipal corporation" includes a village, township, or a combination of two or more of these when acting jointly. MCL 691.1401(a). Accordingly, CACA, a combination of two or more villages or townships that were acting jointly under the authority of the urban cooperation act[2] to administer and enforce the construction code is within the definition of a "governmental agency" for purposes of MCL 691.1407(1). See *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605-606; 528 NW2d 835 (1995).

Plaintiff, however, contends that Lima Township could not delegate its enforcement responsibilities under the construction code act, MCL 125.1501 *et seq*. To support his position, plaintiff references a letter written in March 2000 to Lima Township by Scott Fisher, Director of the Office of Local Government and Consumer Services, in response to the township's

[2] Under the urban cooperation act a public agency, including a township or village, "may exercise jointly with any other public agency of this state . . . any power, privilege, or authority that the agencies share in common and that each might exercise separately." MCL 124.502(e), 124.504.

application to administer and enforce the state construction code. The trial court also relied on this letter when it ruled that CACA is not a governmental agency.

In the letter, Fisher informed Lima Township that, as the "enforcing agency," it could not delegate its administrative and enforcement responsibilities to CACA, which he said was limited to functioning only as a "third-party private inspection agency." To explain this position, Fisher cited an Attorney General opinion, OAG, 1975, No 4,885, p 126 (August 15, 1975), which stated that the powers of a designated enforcing agency cannot be delegated to a private third party. This opinion was issued in response to the question of whether an enforcing agency could hire a private firm to provide inspection and other related services. OAG, 1975, No 4,885, p 126 (August 15, 1975). The Attorney General responded that governmental units could contract with private organizations for inspection or other technical assistance, but they could not delegate to a private firm the power to suspend or revoke a building permit or perform other governmental functions required by the construction code act. *Id*.

The opinion does not, however, address whether a governmental unit such as Lima Township can enter into an agreement for the joint enforcement of the act. The state construction code act permits a governmental subdivision to assume responsibility for administration and enforcement of the construction code. MCL 125.1508b(1).[3] The act further states that "[g]overnmental subdivisions may provide by agreement for joint enforcement of this act." MCL 125.1508b(2). A "governmental subdivision" includes a village or township that has assumed responsibility for administering and enforcing the act and the code within its jurisdiction. MCL 125.1502a(1)(t). Because the state construction code act specifically permits joint enforcement of the act, we reject plaintiff's argument that Lima Township could not delegate its enforcement responsibilities under the act, MCL 125.1501 *et seq*., to CACA through the interlocal agreement.

Therefore, unless a statutory exception applies, CACA is entitled to immunity if it was engaged in the exercise of a "governmental function," MCL 691.1407(1), i.e., "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law," MCL 691.1401(f). This definition is broadly applied and requires only some statutory or legal basis for the activity in which the governmental agency is engaged. *Baker*, *supra* at 607. The enforcement and administration of the construction code is expressly authorized by statute and thus satisfies the definition of a governmental function. See MCL 125.1501 *et seq*.

We are not persuaded by plaintiff's argument that, even if CACA is a governmental agency, it is not entitled to immunity because it was engaged in a proprietary rather than a governmental function. Under MCL 691.1413, governmental immunity does not extend to activities "conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees." The stated purpose of CACA is to administer and enforce construction codes, and its budget is based on a fee schedule. Although plaintiff alleges that the purpose of the CACA is to produce a pecuniary profit, he does not offer evidence to support this assertion, and the activity in question

[3] MCL 125.1508b was amended by 2006 PA 192. The amendment does not impact the subsections cited in this opinion or the analysis based upon those subsections.

is one that is normally supported by taxes or fees. See *Baker*, *supra* at 608. Therefore, the proprietary function exception does not apply and CACA is entitled to immunity as a governmental agency engaged in the discharge of a governmental function. See MCL 691.1407.

Defendants next argue that the two individual defendants, Connell and Miller, are entitled to governmental immunity. We agree.

Defendants argue that Connell, as the highest appointed executive of CACA, is entitled to absolute immunity under MCL 691.1407(5). In the alternative they argue that Connell and Miller were entitled to immunity under MCL 691.1407(2), which provides that a lower level government employee is immune from tort liability for an injury caused in the course of his employment if the following conditions are met: (1) the employee reasonably believes that his actions are within the scope of his authority; (2) the employee is discharging a governmental function; and (3) the employee's conduct does not amount to gross negligence that is the proximate cause of the injury. MCL 691.1407(2); *Tarlea v Crabtree*, 263 Mich App 80, 89; 687 NW2d 333 (2004). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).

Here, we would conclude that a genuine issue of fact exists as to the issue of gross negligence. Plaintiff has provided ample evidence that the work approved by Connell and Miller was not up to code and that the defects would have been obvious upon adequate inspection. See *Tarlea*, *supra* at 83. But, plaintiff must also demonstrate that any gross negligence by Connell and Miller was the proximate cause of his injuries. MCL 691.1407(2)(c); *Rakowski v Sarb*, 269 Mich App 619, 636; 713 NW2d 787 (2006). He cannot. To satisfy the causation requirement, a defendant's conduct must be "the one most immediate, efficient, and direct cause" of plaintiff's injuries. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Even accepting plaintiff's allegations as true, it was the negligent or intentional violation of the code by the builder that was the most direct, immediate, and efficient cause of plaintiff's injuries. To the extent that the building contractor engaged in shoddy workmanship and failed to meet the code requirements because he was receiving preferential treatment from Connell and Miller, it is still his conduct that most directly caused plaintiff's injuries. Therefore, because their conduct, even if grossly negligent, could not be *the* proximate cause of plaintiff's injuries, Connell and Miller are entitled to immunity under MCL 691.1407(2) and their motion for summary disposition should have been granted. Accordingly, we need not reach the issue whether Connell is entitled to absolute immunity under MCL 691.1407(5).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot